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IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

THE DISCIPLINARY BOARD OF THE SUPREME COURT OF PENNSYLVANIA,
Petitioner,

v.

MICHAEL J. ROTKO, JAMES J. WEST, and THOMAS W. CORBETT, JR.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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REPLY BRIEF FOR THE PETITIONER

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In their Brief in Opposition to Petition for Certiorari, respondents assert that the decision of the Court of Appeals invalidating Rule 3.10 of the Pennsylvania Rules of Professional Conduct was "virtually compelled" by this Court's decisions in *United States v. R. Enterprises*, 111 S. Ct. 722 (1991), and *United States v. Williams*, 112 S. Ct. 1735 (1992). Respondents' contention is based on a flawed interpretation of these cases: that both grand juries and the prosecutors appearing before them must be completely unfettered in their efforts to ferret out criminal activity.

To the contrary, both *R. Enterprises* and *Williams* recognize that the authority of grand juries and especially of

prosecutors is not without bounds. In *R. Enterprises*, this Court emphasized that "[t]he investigatory powers of the grand jury are . . . not unlimited." 111 S. Ct. at 727. The Court then proceeded to define the "reasonableness limitation" imposed by Federal Rule of Criminal Procedure 17(c) on the use of grand jury subpoenas. *See id.* at 727-28. Likewise, in discussing rules intended to ensure the integrity of the grand jury, *Williams* listed a number of the "standards of behavior" for prosecutors contained in the United States Code, including the prohibition on grand jury use of unlawful wiretaps and the criminalization of false declarations and the subornation of perjury before a grand jury. 112 S. Ct. at 1741 n.6. Thus, this Court has repeatedly acknowledged that grand juries and prosecutors are constrained by norms of appropriate behavior. The instant case poses the important question whether an ethical stricture such as the Commonwealth's Rule 3.10, which specifies the manner in which prosecutors should conduct themselves in their use of grand jury subpoenas to attorneys, is an acceptable curb on a perceived prosecutorial abuse.

R. Enterprises and *Williams* are also far different from the case at bar in that they did not involve a fundamental state interest which must be balanced against the grand jury's execution of its investigatory function. Here, the Commonwealth has a strong interest in regulating its attorneys, including prosecutors, to ensure that their conduct is consistent with the high ethical standards demanded of the profession. This Court has long recognized the States' compelling interest in regulating the conduct of their attorneys. *See, e.g., Leis v. Flynt*, 439 U.S. 438, 442 (1979); *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 792 (1975); *Cohen v. Hurley*, 366 U.S. 117, 123-24 (1961).

In addition, respondents seek to downplay the impact of the Court of Appeals' decision on local rules other than Rule 3.10. Respondents do not dispute that the Court of Appeals announced a test that would invalidate

a local rule whenever not affirmatively authorized by a Federal Rule of Criminal Procedure. Instead, they attempt to divert attention from the Court of Appeals' test by contending that whether or not the "affirmatively authorized" test is suitable, Rule 3.10 is not only "not authorized," but is in actual conflict with the Federal Rules of Criminal Procedure. Respondents' argument begs the question of what constitutes a "conflict." The Court of Appeals itself conceded that "[i]n the present case, there may not be a literal conflict between Rule 3.10 and Fed. R. Crim. P. 17." Pet. App. 10a.[1] In any event, the essential point, and the one that respondents avoid addressing, is that the Court of Appeals' unprecedented "affirmatively authorized" test will subject numerous local rules, including the majority of ethical local rules, to invalidation. This prospect alone warrants this Court's review of the Court of Appeals' decision.

Respondents adopt a similar diversionary tactic with respect to the Court of Appeals' ruling that a local rule is only authorized if it addresses a "matter of detail." On the one hand, respondents attempt to distance themselves from the Court of Appeals' test, arguing that the Court of Appeals did not intend to give the "matters of detail" phrase "an inflexible, talismanic significance." Opp. 11. On the other hand, respondents maintain that whatever the proper test might be, Rule 3.10 places such a significant burden on prosecutors that it must violate that test.[2] Respondents again miss the point with respect

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[1] Respondents asserts that a "conflict" exists because Fed. R. Crim. P. 17 establishes a comprehensive scheme for the issuance of grand jury subpoenas which will suffer no supplementation. There is nothing to indicate, however, that Fed. R. Crim. P. 17 intended to exempt federal prosecutors from the ethical rules promulgated by the courts in which they practice and by the State bars of which they are members. It was this very lack of an actual conflict which prompted the Court of Appeals to adopt its "affirmatively authorized" test.

[2] Respondents fail to explain how the simple ethical prescription contained in Rule 3.10 is more of a "basic procedural innovation"

to the consequences of the Court of Appeals' decision. To require that all local rules address only "matters of detail" would result in the invalidation of a myriad of federal local rules. *See* Pet. 14-19. And ironically, the federal local rules of the greatest significance would be the first to fall under the "matter of detail" test.

The Court of Appeals' decision invites widespread challenge to federal local rules. In addition, it fails adequately to acknowledge the important interest of federal district courts and the States in establishing and enforcing standards of ethical behavior for attorneys. Although there is a significant interest in ensuring that grand juries obtain prompt access to evidence of potential crime, there is likewise a powerful interest in ensuring that the prosecutors who appear before those grand juries conduct themselves in a fair and ethical manner. Rule 3.10 is an appropriate attempt by the Commonwealth of Pennsylvania to strike the correct balance between these competing interests.

For the foregoing reasons, we respectively submit that the petition for writ of certiorari should be granted.

Respectfully submitted,

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than the six-member jury approved by this Court as within the district courts' rulemaking authority in *Colgrove v. Battin*, 413 U.S. 149 (1973).